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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 559

L. R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY, AND SEABOARD AIR LINE RAILWAY COMPANY,

Petitioners,

vs.

JOHN GRANT LAUGHTER.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION AND MOTION TO SUBSTITUTE.

JOHN H. KERR,
DANIEL A. REED,
Counsel for Respondent.

INDEX.

Subject Index.

	Page
Statement of the case	1
Official report	6
Argument	6
Motion to substitute	12

Table of Cases Cited.

Hart v. *Railroad*, 205 N. Y. 37, 98 N. W. 4439	9, 10
Lake Shore. Mich., etc., R. R. Co. v. *Baldwin*, 19 Ohio Circuit Court Reports 338	9, 10
Laughter v. *Powell*, 219 N. C. 689	5, 10
Lupher v. *Railway Company*, 81 Kansas 586	9, 10
Minn., St. Paul, etc., R. R. Co. v. *Borum*, 286 U. S. 447	9, 10
Minn., St. Paul & S. S. M. Ry. Co. v. *Rock*, 279 U. S. 410	8

Statutes Cited.

Federal Employers' Liability Act (45 U. S. C. 51-59)	1
Federal Employers' Liability Act, Sec. 5 (45 U. S. C. 55)	6

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Petitioners,

vs.

JOHN GRANT LAUGHTER.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, now A. B. Laughter, administrator of John Grant Laughter, respectfully showeth to the Court:

Statement of the Case.

This action was tried in the State Court of North Carolina under rules set forth by the Federal Employers Liability Act of 1908 (United States Code Title 45, section 51-59). Since the judgment of the Superior Court of Warren County, North Carolina, in which said case was tried, and

the affirmation of that judgment by the Supreme Court of North Carolina the original plaintiff, John Grant Laughter, has died, having died on August 26th, 1941, and his father, A. B. Laughter, the respondent in this action, has been appointed Administrator upon the estate of the said late John Grant Laughter by the Superior Court of Warren County, North Carolina, has duly qualified as such administrator, and a motion to substitute A. B. Laughter as party respondent is now on file in the court.

To those facts contained in petitioners' *Statement of Case* as set forth on pages 1 thru page 4 of the Petition, your Respondent desires to add the following facts:

On March 18, 1937, John Grant Laughter, now respondent's intestate, a resident of Norlina, Warren County, North Carolina, filed with the office of T. A. Norris, Trainmaster for Seaboard Air Line Railway Company, in Raleigh, North Carolina, an application for employment (R. 44-45). Such application contained the names of three people residing in Norlina, one of whom was a merchant, another the Chief of Police of Norlina, and the third an employee of the petitioner, to-wit, W. E. Duke, who is petitioner's general yard-master at Norlina.

Respondent's intestate, John Grant Laughter, was duly examined by the proper employees of the petitioner and found to be "*physically and mentally fit to do the work*" (italics ours) (R. 44-45). As a result of the application and examination of the respondent's intestate he was employed by the said petitioners in April of that year and went to work for petitioners as a trainman (R. 50) on a freight operating from Norlina, North Carolina, to Portsmouth, Virginia (R. 20). While working on such freight and while engaged in uncoupling a car at Boykins, Virginia, pursuant to instructions by the petitioners' conductor on said freight train, to set off on a sidetrack at Boykins a car, which par-

ticular work engaged in by respondent's intestate necessitated him going between cars for the purpose of uncoupling same, and while between the cars and so engaged in the work of uncoupling same, the train was suddenly moved, which movement on the part of the train caught the hand of the respondent's intestate between the drawhead and the bumper on the car and seriously and permanently injured the right hand and arm of respondent's intestate (R. 21-22).

At the time of his injury the respondent's intestate had been working for petitioner Railway Company for about six months (R. 22).

Respondent's intestate alleged that while he was engaged in the performance of his duties as trainman as an employee of petitioner railway company and was between the cars in performance of such duties, the train was negligently moved and his right arm was caught between the drawhead and the bumper of one of the cars, resulting in the injury of which he complained (R. 2-3).

As to the movement of the train and the whereabouts of respondent's intestate, at such time, the petitioner railway company's witness, Bryant (who was the conductor in charge of said freight train, R. 34), testified as follows:

> "I had a car for Franklin that was backed in on the other Franklin cars on the new track and then I was going to set my Boykins cars on the R. and T. main line that runs parallel, and when I was backing the Franklin car to set it off is when Mr. Laughter's hand got caught, the first move I made preparatory to setting the car off the train was backing into this storage track. After we backed the cars into the track Mr. Laughter waved them down to cut off the car.
>
> "Q. When Mr. Laughter waved them down what happened to the train, whether it stopped or not?
>
> "A. It stopped. At that time I was about forty feet behind. I was about at the end of the car that we were going to set off. There were some more cars back there

and if it backed up enough to hit them he would make the coupling, but it stopped before it got to those cars. I was about forty feet, about one car length from Laughter at that time. *I saw him go between those cars* italics ours) (R. 34)."

On page 22 of the record the plaintiff Laughter (respondent's intestate) testified as follows:

"Q. Did you know that the car was going to be moved when you went up there?

A. No, I do not know who signaled the engineer to move the car. *The conductor at that time was standing right behind me* (italics ours)".

Petitioner railway company set out in its answer its Rule #705, which provides that "minors must not be employed in train, engine or yard service". In reply to such defense respondent's intestate pleaded Section 5 of the Federal Employers' Liability Act, as amended (United States Code, Title 45, Section 55), which is as follows:

"Section 5. That any contract, rule, regulation or device whatsoever, the purpose or intent of which sh all be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void * * *"

(Reference also page 83, pamphlet entitled: *Compilation of Laws Relating to Mediation, Conciliation, and Arbitration Between Employers and Employees, Etc.* U. S. Government Printing Office, 1938)

Respondent's intestate admitted that he was not twenty one years of age when he made application for employment by the petitioner railway company (R. 26-27). Yet on that application he gave the names of three persons who resided in his home town (one of whom was an employee of petitioner company) as references (R. 45). Yet, the petitioner company made no effort or did not confer with these refer-

ences as testified by petitioner company's witness, Trainmaster Norris (R. 45).

Petitioner company in its *Amended Answer* (R. 6, *et seq.*) sets up as a *First Further Defense* the existence of and violation of its Rule #705, and devotes sixteen paragraphs to an elaboration of its contention that such violation thereof constituted the perpetration of a fraud by respondent's intestate upon petitioner company such as to vitiate the relation of master and servant under the Federal Employers Liability Act. Yet the record is replete with admissions from the lips of the petitioner company's witness, T. A. Norris, Trainmaster for petitioner company, that the petitioner company had abrogated this very rule with respect to the employment of minors as is fully borne out by the testimony set forth on pages 45, 46, 47 and 48 of the Record.

Your respondent respectfully calls the attention of this Honorable Court to the foregoing facts which were omitted from the *Statement of Case* as set forth in the petition filed in this cause. In this connection the attention of this Honorable Court is further respectfully called to that very comprehensive state of facts appended to the opinion rendered by the Supreme Court of North Carolina. (*Laughter* v. *Powell,* 219 N. C., pages 690, 691 and 692).

As to the questions of law raised in the Petition your respondent respectfully requests this Honorable Court to observe that the decision rendered by the Supreme Court of North Carolina (R. 113 through p. 120) is most exhaustive and that there is a citation therein of practically all the cases involving the question at issue. All of the members of that court concurred in that opinion.

Your respondent submits under this cover a brief in support of his contention that the judgment of the Supreme Court of North Carolina be not reviewed by this Honorable Court.

Official Report.

The decision of the Supreme Court of North Carolina is officially reported in 219 N. C. at page 689, 14 S. E. (2nd) at page 826.

Argument.

In both their petition and brief the petitioners insist that the "main question" in this case is whether the respondent's intestate was an employee of petitioners as would entitle him to the benefits of the provisions of the Federal Employers Liability Act. The petitioners contend that he was no such employee for the reason that at the time he obtained employment with petitioners he represented himself to be twenty-one years of age, when in truth he was a year or two younger. Respondent agrees with petitioners in their assertion that this is the "main question" in the case.

As a defense petitioners plead their Rule #705. In answer to such a plea your respondent takes the position that this particular defense urged by the petitioners, was not available in view of the positive terms of Section 5 of the Federal Employers Liability Act (United States Code, Title 45; Section 55). In addition—the petitioners' witness, Mr. Norris, admitted that in other instances of employment the petitioners had for all practical purposes abrogated this rule in that they had made no investigation of applicants' statements as to their ages (R. 45, 46, 47 and 48), nor had they made any as to respondent's intestate's statement as to his age (R. 46).

It was not alleged nor contended by the petitioners that the injuries received by respondent's intestate, as alleged in the complaint filed by the respondent's intestate, were in any way due to or attributable to his physical or mental immaturity or minority. In truth and fact the petitioners

admitted that respondent's intestate was "physically and mentally fit to do the work" for which he was employed to do by the petitioners. On this point the petitioners' witness, Norris, testified as follows:

> "I gave him an examination. * * * I put him to work. He passed the examination which I gave him. * * * A few weeks after I gave him the examination I put him to work. He was given another examination before I put him to work. * * * He passed alright. *I found him physically and mentally fit to do the work* (italics ours) (R. 44-45).

At the time of his injuries respondent's intestate had been working for petitioners "about six months" (R. 22). In the trial in the Superior Court of Warren County, North Carolina, petitioners placed upon the witness stand four men who, in addition to respondent's intestate, constituted the crew of the train on which respondent's intestate was employed at the time he received his injuries, to-wit, Bryant, the conductor (R. 34), Rozar, the engineer (R. 41), Satterwhite, a brakeman (R. 51), and Mason, the fireman (R. 52). From the lips of none of these witnesses, nor from any others offered by the petitioners, came one word to the effect that respondent's intestate was not a competent, reliable and careful employee of petitioners.

This case presents no new nor novel question to this Honorable Court, nor would it present a question of such character to many of the inferior courts of this country. The facts in the case at bar are identical with the facts in the case of *Minn. St. Paul R. R. Co.* v. *Borum*, 52 Sup. Ct. Rep. 612, decided by this Honorable Court on May 23rd, 1932. The only difference between the case at bar and the *Borum* case (*supra*), if such could be called a difference, is that in the case at bar a rule of the petitioners fixing the minimum age of employment is involved, while in the *Borum* case (*supra*) a rule of the petitioner company fixing

a maximum age of employment was involved. With respect to the principles involved there is no difference in the two cases.

As stated in the preceding paragraph this question has been passed upon by many of the inferior courts of the country, which decisions will be mentioned in this brief, and which, to a large extent, are exhaustively examined in the opinion of the Supreme Court of North Carolina (R. 113), which sustained by a unanimous court the judgment of the Superior Court of Warren County, North Carolina.

The petitioners rely upon the case of *Minn. St. Paul & S. S. M. Ry. Co.* v. *Rock*, 279 U. S. 310, and insist that they "have a decision of the Supreme Court of the United States directly in point on the question of the right of plaintiff to maintain this action." The respondent insists that by no stretch of the imagination can that authority govern the case at bar. Rock was an impostor and the court held that his "deception set at naught the carrier's reasonable rules and practices established to promote the safety of employees and protect commerce. It was directly opposed to the public interest because it calculated to embarrass and hinder the carrier in the performance of its duty and to defeat important purposes sought to be advanced in the Act".

Rock applied for work under his true name. He was found upon examination to be unacceptable to the carrier's rules and practices. Later, representing that he had not theretofore made an application, he applied again, but under a different name and secured another man to impersonate him and in his place to submit to the required physical examination, and by these means Rock deceived the railway company and thereby secured employment in which he later suffered injuries. The Court said, in part—"As a result of Rock's concealment his status was at all times wrong and a fraud upon the petitioners and a peril

to its patrons and its employees. Right to recover may not justly or reasonably be rested on a foundation so abhorrent to public policy" (*Rock* case, *supra*).

In *Minn. Etc. R. R. Co.* v. *Borum*, 286 U. S. page 447, 52 Sup. Ct. Rep. 612, the petitioners attempted to have this Honorable Court deny Borum's recovery based upon the authority of the *Rock* case, *supra*. The only difference in the facts disclosed in the *Borum* case, *supra*, and the case at bar is that Borum represented when he was employed that he was 38 years of age, when he was in truth 49 years of age. He passed the examination and the report of the surgeon showed that he was in good health and acceptable physical condition. Respondent's intestate, John Grant Laughter, was nearly 20 years of age, but reported his age to be 21 years. He was examined by the petitioners and found to be in good condition physically and mentally. The identity of respondent's intestate was at no time concealed, nor did respondent's intestate attempt to conceal his identity for he gave, as references three men who lived in his own home town, one of whom was an employee of petitioners, to-wit, yardmaster at Norlina for Seaboard Air Line Railway Company.

In *Hart* v. *Railroad*, 205 N. Y. 37, 98 N. W. 4439, the court held that there being no allegation of plaintiff's injury being due to his minority or immaturity the defendant could not raise the question that the plaintiff was not an employee on account of his minority or immaturity.

In *Lake Shore, Mich. Etc. R. R. Co.* v. *Baldwin*, 19 Ohio Circuit Court Reports page 338, the court held that "the rule of the railroad company requiring its employees to be 21 years of age is a reasonable rule, but we cannot agree with the counsel that the false statement of Glenn Baldwin as to his age made him a trespasser upon the cars of the defendant company".

In *Lupher* v. *Railway Co.*, 81 Kansas 586, the Court held that "the fact that a brakeman obtains his position by

falsely stating that he was of full age when he was in fact but 18 years old (a rule of the company forbidding the employment of minors in that capacity) does not relieve the company from its obligation to exercise the same care for his protection that is due any other employee, or disentitle him to recover for any injury due to the want of care and not occasioned by his minority or immaturity".

The injuries received by respondent's intestate had no causal connection with either his minority or immaturity, nor was there any such allegation in the pleadings of the petitioners nor in the proof petitioners offered at the trial in the Superior Court of Warren County, North Carolina.

The respondent again respectfully calls the attention of this Honorable Court to the opinion of the Supreme Court of North Carolina in the case at bar (R. 113), and submits that this opinion contains a complete and comprehensive analysis of all the authorities that bear upon the principles involved in the case at bar, which authorities sustain the contentions of the respondent.

The contract of employment which the respondent's intestate, John Grant Laughter, had with the petitioners was a voidable one only, and the petitioners could have discharged respondent's intestate at any time. This is the only right the petitioners could have exercised, certainly there is no legal authority disclosing any decision of our courts which would allow the petitioners to negligently injure such an employee and not be liable for such injury.

In support of his contentions in the case at bar the respondent cites the following cases and those cited therein, namely:

Minn., St. Paul, etc., R. R. Co. v. *Borum*, 286 U. S. 447;
Laughter v. *Powell, Receiver, etc.*, 219 N. C. 689;
Lupher v. *Railway Company*, 81 Kansas 586;
Lake Shore, Mich., etc. R. R. Co. v. *Baldwin*, 19 Ohio Circuit Court Reports 338;
Hart v. *Railroad*, 205 N. Y. 37, 98 N. W. 4439.

In conclusion this respondent submits that there has been no error committed in the trial of the case at bar; that the decision of the Supreme Court of North Carolina in the case at bar should be sustained, and that the petition for writ of certiorari should be dismissed.

WHEREFORE your respondent respectfully prays that a writ of certiorari be not issued out of and under the seal of this Honorable Court to the end that the judgment of the Supreme Court of North Carolina be reviewed.

Respectfully submitted,

JOHN H. KERR,
DANIEL A. REED,
Attorneys for Respondent.